93-962

NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RICHARD L. POPE, JR.
on behalf of himself and the class of all persons similarly situated,
Petitioners,

v.

UNIVERSITY OF WASHINGTON,
an instrumentality of the State of Washington,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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December 17, 1993

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QUESTIONS PRESENTED

1. Has the Supreme Court of Washington denied Petitioners equal protection of the laws under the Fourteenth Amendment by allowing Respondent, an instrumentality of the state, to improperly withhold earned wages under color of federal law from, and not refund such wages to, a large portion of its employees, where

   (a) the Respondent ceased wage withholding and provided wage refunds to other employees in exactly the same situation; and

   (b) as a result of the Supreme Court of Washington's decision, there has been a substantial difference in application of the law to similarly situated citizens without any rational basis?

2. Did the Supreme Court of Washington deny equal protection under the Fourteenth Amendment by ruling that the State of

Washington's wage collection statute, RCW 49.48.010, creates two classes of employees: terminated employees, who can seek recovery of wages improperly deducted by their employers, and non-terminated employees, who have no right to recover wrongfully withheld wages under the statute, where

(a) the purpose of the statute is to ensure that employees receive their full wages; and

(b) the distinction created by the Supreme Court of Washington is not rationally related to that purpose?

3. Did the Supreme Court of Washington deny Petitioners due process under the Fourteenth Amendment by ordering, *sua sponte*, summary judgment for the Respondent on issues neither raised, briefed, nor argued by the parties on appeal and

deciding factual issues without giving Petitioner an opportunity to be heard, where

(a) the court gave Petitioners no notice of its intent to rule on the issues it considered determinative;

(b) the court gave Petitioner no opportunity to be heard on those issues before the court decided them; and

(c) those issues presented factual questions which the court, *sua sponte*, decided against Petitioners without giving them an opportunity to present evidence?

4. Does federal law concerning social security and social security taxation (42 U.S.C. § 410, *et seq.*; 26 U.S.C. § 3101, *et seq.*), authorize or permit state employers to withhold wages for

social security contributions or taxes from public employees who are excluded from social security coverage? If not, did the Supreme Court of Washington misinterpret and improperly apply federal social security law by holding that the Respondent, an instrumentality of the State of Washington, was presumptively authorized to deduct wages for social security from its employees, even if those employees were excluded from social security coverage, unless expressly prohibited from doing so by contract or statute?

PARTIES TO THE PROCEEDINGS

Petitioners Richard L. Pope, Jr. and a class of present and former employees of the University of Washington similarly

situated[1] were plaintiffs and respondents in the Washington Supreme Court below.

The Respondent University of Washington ("University"), an agency or instrumentality of the State of Washington, was the defendant and appellant below.

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[1] Richard L. Pope, Jr., a former University employee, commenced this action on his own behalf and on behalf of a class of employees employed by the University of Washington in job positions not eligible for coverage under a state retirement program at any time from March 14, 1983, to February 1, 1991, and from whose wages the University withheld social security contributions. *See* App. B-2. Although the exact number of class members was not determined prior to the Washington Supreme Court's decision, Respondent had estimated the class to include upwards of 30,000 employees or more.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner Richard L. Pope, Jr., on behalf of himself and a class of similarly situated employees, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Washington entered as modified on September 21, 1993.

OPINIONS BELOW

An initial decision of the Supreme Court of Washington was issued May 20, 1993. (Reported at 121 Wn.2d 479, 852 P.2d 1055 (1993) (*see* Appendix A.) Petitioner timely moved for reconsideration (*see* Appendix C), which was granted (*see* Appendix D). On September 21, 1993, the opinion was modified (*see* Appendix E). The Mandate of the Supreme Court of Washington issued on October 13, 1993 (*see*

Appendix F.) The decision was an appeal from a judgment of the Washington Superior Court for King County, which was based on Findings of Fact and Conclusions of Law entered December 5, 1991 (*see* Appendix B).

JURISDICTION

This Court has jurisdiction to review the judgment of the Supreme Court of Washington by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and federal and state statutes (relevant portions reproduced in Appendix G):

-- U.S. Const. Amend. XIV, § 1

-- 26 U.S.C. § 3101

-- 26 U.S.C. § 3121(a) and (b)(7)

-- 42 U.S.C. § 410(a)(7), § 418

-- Revised Code of Washington (RCW) 41.48.040

-- Revised Code of Washington (RCW) 49.48.010

STATEMENT OF THE CASE

A. Summary of Procedural Background.

This action was commenced by Richard L. Pope, Jr. for himself and a class[2] of similarly situated employees of the University of Washington to recover wages the University had wrongfully, and without right or authority, withheld from them as social security contributions.[3] Petitioners were not subject to social security withholding. The University, despite knowing that Petitioners were within a class of employees exempt from social security, deducted wages from them anyway. Petitioners alleged that this wrongful taking of their wages was a breach of

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[2] *See* footnote 1, *supra*.

[3] For example, a class employee earning $20,000 per year lost $1,212 in 1988 due to the University's improper wage deductions.

their employment contract (*i.e.*, the University failed to pay the full wage promised) and Washington's wage payment statute (RCW 49.48.010).

The trial court certified the class and granted Petitioners' motion for summary judgment on their liability claims. At a subsequent trial on relief the University requested the trial court to reconsider its liability rulings. The trial court reaffirmed its rulings, entered Findings of Fact and Conclusions of Law, and granted relief accordingly. (App. B)

The University appealed. The Washington Supreme Court reversed the liability findings. In an apparent effort to protect the state treasury and a state institution from its own errors, the Washington court entered a decision which denied Petitioners their constitutional rights of due process and equal protection under the

Fourteenth Amendment and incorrectly interpreted and applied federal law regarding social security taxation of public employees.

B. Respondent's Lack of Authority to Withhold Wages.

As originally enacted, the 1935 Social Security Act excluded state employees. Amendments in 1950 allowed states to enroll public employees on a voluntary basis. Social Security Act Amendments of 1950, Pub. L. No. 81-734 § 210 (codified as 42 U.S.C. § 410(a)(7)(A)). These amendments permitted states to enter into formal agreements with the federal government to extend social security coverage to designated groups of employees of the state or its political subdivisions. *Id.*, § 218 (codified as 42 U.S.C. § 418).[4]

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[4] This Court explained the history of section 418 in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 447 U.S. 41, 44-45 (1986).

This extension of coverage, however, did not include public employees covered by a retirement program. *Id.* In 1954 the Act was amended again to allow coverage of employees covered by a retirement program. Social Security Amendments of 1954, Pub. L. 83-761, § 101 (codified as 42 U.S.C. § 418(d)).

States and their subdivisions enroll their employees in social security through their agreement with the federal government in "coverage groups" rather than employee by employee. There were two basic coverage groups: (1) "absolute coverage groups" which consist of employees in positions not covered by a state retirement plan, and (2) "retirement system coverage groups" consisting of employees in positions which are covered by a state retirement plan. 1 Social Security Law and Practice, Sec. 4:37 (1987).

The Washington Legislature authorized the Governor to enter into an agreement with the federal government to extend social security to public employees. RCW 41.48.030. This agreement, called the "Basic Agreement", was entered into in 1951 on behalf of the state and certain instrumentalities and subdivisions listed in an appendix to the Basic Agreement. The University was not included.

In 1955 the University separately applied and was added to the Basic Agreement. The University's coverage group was limited to employees covered by its retirement program, the Teachers' Insurance and Annuity Association Retirement System (TIAA). In 1957 the Basic Agreement was modified to extend social security to employees, including specifically University employees, covered by the state retirement system, the Public Employees Retirement System (PERS). Thus, social

security coverage at the University was a "retirement system coverage group" (*i.e.*, only University employees covered by a retirement plan were subject to social security).

Social Security is financed, in part, by taxes imposed on employees under the Federal Insurance Contributions Act ("FICA"). 26 U.S.C. § 3101(a). Federal law specifically exempted state employees from this FICA tax unless they were included in an agreement authorized by section 218 of the Social Security Act (42 U.S.C. § 418). 26 U.S.C. § 3121(b)(7).

The Washington statute authorizing social security coverage for public employees provided that employees "whose services are covered by an agreement" (*i.e.*, the Basic Agreement as modified) were required to contribute wages for coverage "equal to the amount of employee tax [imposed by

FICA] if such services constituted employment within the meaning of [FICA]." RCW 41.48.040(1). If applicable, this contribution was to be collected by the employing agency from wages when paid. RCW 41.48.040(2). However, as the trial court found and not challenged by the University, if the employee was not covered by the Basic Agreement, then his or her services were not "employment" subject to social security and the employer had no right to deduct wages for that purpose. (App. B 7-8)

In the late 1970s a dispute arose between the Social Security Administration (SSA) and the University as to whether certain employees were subject to social security withholding. The University, with assistance from the State Employment Security Department (EMS, the state agency responsible for administering OASDI) and the state Attorney General's office,

"thoroughly investigated" the Basic Agreement and proved it extended coverage only to employees eligible to participate in a state retirement program (i.e., it provided for "retirement system coverage groups"). In 1981 the SSA concurred, concluding that "it is our determination that the Washington Agreement does not extend coverage to state employees as members of an absolute coverage group."[5] The trial court found (App. B 10):

> In June 1981, the federal Social Security Administration and the Washington State Employment Security Department, after considering the materials submitted by defendant, agreed with defendant that the Basic Agreement did not extend social security coverage to all state employees as an absolute coverage group but instead extended coverage on a retirement program eligibility group basis. As of June 1981, all relevant parties to the Basic Agreement, i.e. the federal government, the State of Wash-

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[5] Letter, U.S. Dept. of Health & Human Services to Washington's OASI Administrator, June 11, 1981 (Trial Ex. 2).

> ington, and the University of Washington, agreed that only those state employees who were in job positions eligible to participate in a state retirement program, namely, either TIAA or PERS, were covered by and subject to social security.

In 1983 the EMS advised all state agencies, including the University, that the Basic Agreement provided "'retirement' system coverage rather than 'absolute' coverage" and that only "positions that are eligible for retirement system coverage are included for social security purposes." (App. B 11) State employing agencies were directed to identify retirement-ineligible employee positions so that social security withholding could be stopped and refunds or credits provided to affected employees. Rather than complying with the directive to identify "all" such employees, the University limited its selection to research and teaching assistant employees (RA/TAs). (App. B 13-14)

The University's controller explained that the University limited its selection "pure and simple as a desire to increase the take-home pay of the TAs and RAs." (App J)

After some initial confusion as to whether RA/TAs were retirement-system eligible, the SSA in 1987 agreed that the RA/TAs were not eligible and thus were not subject to withholding. The University immediately stopped wage withholding for RA/TAs and undertook an aggressive campaign of locating and contacting present and former RA/TAs to refund previously withheld wages back to 1980.[6] (App. B 15-16).

Although it provided wage withholding relief for the RA/TA employees, the University chose not to provide such relief to other employees (*i.e.*, Petitioners) who

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[6] Over $6 million was refunded to over 7,000 RA/TAs.

were in exactly the same situation (*i.e.*, not eligible for a state retirement plan and hence not subject to social security withholding).[7] The trial court found:

> Defendant knew that plaintiff and other employees were employed by defendant in job positions which were not covered by a state retirement program. Under the Basic Agreement as understood and followed by defendant, plaintiff and such other employees were not covered by the Basic Agreement and not subject to social security. Despite the knowledge that plaintiff and other employees were not in job positions eligible to participate in a retirement program, defendant withheld wages from these employees for social security. [App. B 22]

For example, in 1987, just after the SSA agreed that RA/TAs were not subject to withholding, University officials, in

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[7] The proof showed that "at that time there were other job positions which were likewise not eligible under any of the state's retirement systems and not subject to social security, but which were not listed or identified by defendant. Rather than discontinue withholding of the wages of the employees in these other job positions, the University continued, and intended to continue, to withhold wages from those employees for social security." App. B 13-14.

discussing wage refunds, recognized that there were "other similar groups" who were also "in the non-retirement group" but chose not to stop withholding or to provide wage refunds for them. (Appendix K) The University's Vice President testified that relief was not pursued for Petitioners because there was "no champion for that effort as there had been in the case of the RAs and TAs." (Appendix L)

Mr. Pope was employed in a non-retirement eligible position and questioned the University's right to take his wages. The University eventually acknowledged that 52 job positions were not subject to withholding and stopped withholding for 32 of them (including Mr. Pope's) in January, 1990. (App. B 18) The University did not, however, stop its practice of withholding from all ineligible employees.

In stark contrast to the RA/TAs, the University did not provide wage refunds

for the employees from whom it admittedly withheld wages for over seven years without right or authority.[8] In 1990 the University decided it would assist employees who inquired about obtaining refunds from the IRS, but it also adopted a policy not to advise present or former employees about the refund potential. (App. B 20-22). The IRS told the University that the IRS would not accept individual employee requests and that the University, as the employer, was responsible for providing refunds to the affected employees.[9] The University thereafter refunded almost

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[8] At trial Respondent's counsel conceded to the trial court that the University's withholding of wages from Petitioners was "legally erroneous" and that "social security should not have been withheld at the time that it was." (App. C 8 fn 3)

[9] Under the applicable IRS regulation, the employer has the responsibility for refunding the wages it improperly took from employees: "If an employer collects from any employees and pays to the district director more than the correct amount of the employee tax under [FICA] . . . the employer shall repay or reimburse the employee in the amount thereof[.]" 26 CFR § 31.6413(a)-1(b)(1)(i) (1990) (emphasis added).

$1,750,000 to 680 non-RA/TA employees. In March, 1991, the University stopped this effort and refused to provide refunds for the balance of Petitioners.

The result has been that the University allowed some employees to keep all of their wages and provided them wage refunds for wrongfully withheld wages from previous years, but continued to withhold wages from other, similarly situated employees without right, authority, or rational justification, and did not provide them with wage refunds.

C. Proceedings Below.

Because the University refused to refund to him and other affected employees the wages it wrongfully withheld, and because it refused to stop withholding from all affected employees, Mr. Pope commenced this class action to recover the amounts wrongfully withheld. Petitioners alleged,

inter alia, (1) that the employer's failure to pay the full wage promised by withholding part of the wage owed without right or authority constituted a breach of contract, and (2) the employer's wrongful withholding was a breach of Washington's wage statute, RCW 49.48.010. That statute declared it "unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is (1) required by state or federal law, or (2) specifically agreed upon [by the employee]." Petitioners also claimed punitive damages under a Washington statute which allows double damages if wages are withheld "willfully and with intent to deprive the employee of any part of his wages." RCW 49.52.050, .070.

The trial court granted Petitioners' motion for summary judgment on liability, finding that the University breached its

employment contract with Petitioner and violated RCW 49.48.010. The trial court subsequently held that the University breached RCW 49.52.070 and awarded judgment accordingly. (App. B)

On direct appeal to the Washington Supreme Court the judgment was reversed. *Pope v. University of Washington, supra.* Although acknowledging that the employer/employee relationship was contractual, the Washington Supreme Court, *sua sponte*, created new contract law which placed new and unique burdens on Petitioners to recover their wages. The court first held that before Petitioners could recover damages for breach of contract they had to prove there was a specific contract term prohibiting social security withholding. Thus, the court imposed upon Petitioners the burden of proving a contract term "obligating the University to refrain"

from doing what it had no legal right to do in the first place (*i.e.*, withhold wages). 121 Wn.2d at 488, 852 P.2d at 1060. (App. A 18) Absent such proof Petitioners could not recover for breach of contract. Rather than remanding to allow Petitioners to present evidence to meet this new and unique requirement, the court found as a fact that there could be no such proof and directed summary judgment for Respondent. On reconsideration the court implicitly recognized the unusual burden it had created for employees trying to recover their wages. It stated that its new breach of contract requirement applied only to Petitioners, because they were seeking wages wrongfully withheld for social security:

> We do not suggest that an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract

> authorizes the deduction of Social Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. If an employer made deductions from an employee's wages due to dissatisfaction with the employee's work, for example, it would generally be unnecessary for the employee to show an express contract term prohibiting such deductions.

App. E (emphasis added).

The court left unmentioned the fact that Petitioners were statutorily exempt from social security withholding. Thus the court required Petitioners to prove there was some contractual term prohibiting their employer from withholding wages for social security even when the University acted without authority and contrary to law when it withheld wages from Petitioners. In doing so the court denied Petitioners a remedy on their right to be paid the full wage for which they contracted, and did so without giving them prior notice or a hearing on this issue.

The court also held that the wage statute, RCW 49.48.010, could be considered an implied term of the contract. The court, *sua sponte*, however, held that this statute applied only to wages which were due and owing at the time the employee terminated his or her position. 121 Wn.2d at 489, 852 P.2d at 1061 (App. A 20-21). The court then concluded, erroneously and without an opportunity for argument or proof from Petitioners, that Petitioners' claims did not include wages due at the termination of employment, and thus the statute was inapplicable. Again, based upon its unilateral finding of fact, the Washington Supreme Court granted summary judgment to the University rather than remanding for further findings in the trial court.[10]

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[10] The Washington Supreme Court also re-weighed the facts and found that the withholding of wages from Petitioners was not done "willfully and with intent to deprive" them of wages within the meaning

After this decision Petitioners asked the trial court to redefine the class to create a subclass of terminated employees seeking recovery of wages due and owing at time of termination. A substantial portion of the class, including Mr. Pope himself, were such terminated employees. This was done to bring the case into compliance with the Washington Supreme Court's new limitation on this statute. The trial court granted the motion (*see* Appendix H). Upon motion from the University, the Washington Supreme Court quashed the trial court's order, without opinion and without argument. (*See* Appendix I.) Thus the Washington Supreme Court again denied Petitioners a remedy for a right (*i.e.*, to recover under RCW 49.48.010) which the court itself had defined.

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of RCW 49.52.050, and hence there was no violation of that statute either. 121 Wn.2d at 490, 852 P.2d at 1061.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington explicitly approved arbitrary distinctions in the application of statutory and common law, thereby depriving Petitioners of their equal protection rights under the Fourteenth Amendment. The court's decision raises substantial questions regarding the state's ability to create arbitrary and irrational distinctions between similarly situated state employees in at least three respects:

(1) The University, as a state institution, has been allowed to treat similarly positioned employees in a starkly different manner in terms of withholding and paying wages. It has been allowed to arbitrarily pick and choose, at its whim, which employees are entitled to full wages and to disregard the rest.

(2) The court's decision has created special and irrational burdens of proof that Petitioners must meet in order to prove their employment contract was breached; burdens that no other employee or contracting party has been required to prove. In doing so the Washington court has established subclasses of em-

ployee litigants who are subject to different treatment in the courts.

(3) By construing the State of Washington's wage collection statute as creating distinct classes of terminated employees and non-terminated employees, and allowing only the former to recover wages wrongfully withheld, the Washington Supreme Court has applied the statute in a way which treats similarly placed employees in different ways -- providing relief for some and not for others. It then compounded this unequal treatment by not applying its own newly defined requirements to Petitioners, granting summary judgment for the University even though Mr. Pope and others met the court's criteria.

The court's disparate treatment does not further or support any justifiable, rational state policy. To the contrary, these rulings are irrational, and can be explained only as a means of excusing a state agency from liability.

The Washington Supreme Court's decision also raises substantial questions about the power of state appellate courts to deprive litigants of procedural due process as guaranteed by the Fourteenth

Amendment. The Petitioners respectfully submit that the Washington court, by determining facts and granting summary judgment *sua sponte* to Respondent on the basis of issues not raised by the parties and without notice to the parties of its intent to consider those issues, denied the Petitioners their fundamental right to a day in court. By unexpectedly reinterpreting state law in such a way as to create new fact issues on which evidence had never been presented, failing to remand the case for further rulings by the trial court, and granting summary judgment for the University instead, the court denied Petitioners procedural due process. It deprived them of an opportunity to submit evidence showing why judgment should not be entered against them. The result has been a taking of Petitioners'

property (i.e., their earned wages) without due process of law.

Finally, the Washington Supreme Court incorrectly interpreted and applied federal law regarding social security. Federal law expressly excluded public employees from social security (and wage withholding) unless they were covered by an agreement between the state and the federal government. Petitioners were not covered under the agreement between the State of Washington and the federal government, and hence were not subject to withholding. The court incorrectly applied federal law by assuming, contrary to the federal statutory scheme, that Petitioners were subject to social security taxes. In doing so the court has allowed the University to take property of Petitioners under color of law when, in fact, the legal authority to take those wages did not exist.

Through its application of federal law the court has denied Petitioners a remedy to recover their wages.

A. The Washington Supreme Court's Decision Has Denied Petitioners Equal Protection of the Laws.

The Fourteenth Amendment commands that no person is to be denied equal protection of the law by any state. Citizens can be grouped and classified for different treatment under law if the classification is rational and bears some relationship to a legitimate governmental purpose. The equal protection clause requires, however, that similarly situated persons be treated equally and similarly. *Nordlinger v. Haber*, 505 U.S. ___, 112 ___ 236, 120 L. Ed. 2d 1, 12 (1992) (it "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). *See Smith v. Cahoon*, 283 U.S. 553, 566 (1931) ("[T]he constitu-

tional guaranty of equal protection of the laws is interposed against discrimination that is entirely arbitrary."). *Cf. Logan v. Zimmerman*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring (equal protection applies where state draws "an arbitrary line between otherwise identical claims.")).

Where state action has classified citizens for different treatment, it will not survive equal protection scrutiny unless, at minimum, "the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982); *Nordlinger*, 120 L. Ed. 2d at 12.

Under the Washington Supreme Court's decision artificial classifications have been created among employees who are in exactly the same situation. The result is that persons in like circumstances are

treated substantially differently, such that Petitioners have been denied their full wages while other, similarly placed employees have received all of their earnings.

1. The Washington Supreme Court's Decision Condones And Perpetuates The University's Unequal Application Of The Law.

Applicable federal law clearly provides that only employees covered by social security (*i.e.*, within the Basic Agreement) are subject to wage withholding under FICA. 26 U.S.C. § 3121(b)(7)(E) (1989). The statute neither specifies nor allows for differing classes of non-covered employees for purposes of withholding under FICA. All state employees not covered by the Basic Agreement are exempt from social security withholding.

The University, however, created impermissible classes of non-covered employees and applied the law unequally to those

groups. Out of the total population of exempt employees, the University artificially created a subgroup of research and teaching assistants (RA/TAs) whom it decided should have the benefits of full take-home pay. It correctly applied the law to them by exempting them from wage withholding and refunding their previously withheld wages.[11]

The University treated the balance of exempt employees (*i.e.*, Petitioners) in a starkly different manner. Instead of ceasing withholding for them, the University continued to withhold their wages.[12] The University applied the law authorizing wage withholding differently and unequally to Petitioners.

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[11] Similarly, the University corrected its admitted error by providing for wage refunds for a small number of non RA/TA employees in 1991.

[12] The trial court found that this difference in treatment was purposeful and not accidental. App. B 16-22.

There is no rational basis for this different treatment, nor is any state or public purpose achieved or fostered. This disparate treatment was arbitrary and irrational, undertaken solely because the University wanted RA/TAs to have more "take-home pay" and because there was "no champion" for Petitioners. There is no justifiable purpose in allowing a state agency to choose arbitrarily which employees should receive full wages and which not when all affected employees are owed and entitled to their full wage. In conceding that it was "legally erroneous" for it to have withheld wages from Petitioners, and stopping withholding from some employees in 1990, the University essentially acknowledged it had applied the wage withholding laws differently to Petitioners.

This unequal imposition of wage withholding for FICA taxes unquestionably

violates the equal protection clause. "The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

The Washington Supreme Court's decision condones this unequal treatment under the law. The decision allows the University to ignore the statutory law and treat similarly situated employees unequally. In their Motion for Reconsideration Petitioners raised this issue (App. C), but the court ignored this constitutional problem. The Washington court's perpetuation of the University's unequal treatment under the law must be reviewed.

2. The Washington Supreme Court's Decision Has Established Unequal Burden For Petitioners To Recover For Breach Of Contract.

Under Washington law the relationship between employer and employee is contractual in nature. *Haugen v. Central Lutheran Church*, 58 Wn.2d 166, 168, 361 P.2d 637 (1961). Where the employer offers a wage in return for work and the employee fully performs, the employer becomes obligated to pay the full amount offered. It is axiomatic that where an employer improperly reduces the wage paid the employee has "a right to . . . treat that act as a breach of the [employment] contract." *Warner v. Channel Chemical Co.*, 121 Wash. 237, 244, 208 P.2d 1104 (1922).

While the amount paid under an employment contract may be reduced if the employee agrees or if authorized by law, neither of those conditions apply to Petitioners. Petitioners were not subject to

wage withholding nor did they agree to the unauthorized withholding of their wages. When the University withheld wages for social security without right or authority, it breached the employment contract[13] and Petitioners could sue to recover damages. *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992) (U.S. district court judges could sue for breach of contract and damages to recover social security taxes improperly withheld from their wages; claim was not for a tax refund).

The Washington Supreme Court, however, imposed a new and unique burden on Petitioners to meet to establish their claim for breach of contract. In addition to proving that the contract was breached because the University paid less than what was owed, the court required, for these

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[13] As the trial court observed, "I'm being perhaps simplistic, but the contract was to pay them monies, and monies weren't paid is a breach." RP 64; *see* App. B 29, Concl. of Law 4.

employees only, a showing that their employment contract contained a term prohibiting their employer from taking unauthorized deductions.[14] Thus, for Petitioners to recover their wrongfully withheld wages they must prove that there was an express[15] contract term requiring their employer to refrain from doing what it had no right or authority to do in the first place.

Such an additional burden is superfluous and irrational. No other contractual relation exists where one must, in order

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[14] Even though Petitioners were not covered by the Basic Agreement, the court said that unless they also showed a contractual term prohibiting social security withholding unless authorized, their "breach of contract claim must fail." (App. A 17-18). The court concluded: "The issue, then, is whether the employment contracts contained a term obligating the University to refrain from withholding Social Security from the gross wage unless authorized. The class did not present any evidence that such a contract term was contained, expressly or by implication, in the employment contracts." 121 Wn.2d at 488, 852 P.2d at 1060; App. A 18.

[15] The term must be express, since the court would not imply a promise not to pay less than what was contracted. This, of course, is contrary to basic contract law that one is obligated to perform (*i.e.*, pay) as promised unless excused.

to recover for breach, affirmatively prove a separate, independent contractual term obligating a party to refrain from doing what that party had no authority to do. On reconsideration the Washington court stated that other employees seeking wages due to breach of contract need not show an express contract term prohibiting deductions. For Petitioners, however, the court "assumed" (contrary to federal statute)[16] the deductions were authorized and placed on Petitioners the extra burden of proving a discrete contractual term specifying otherwise.[17] App. E.

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[16] Presumptions such as this are disfavored on due process grounds. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Leary v. United States*, 395 U.S. 6, 29-53 (1969).

[17] Such a burden would be difficult, if not impossible, to meet in any practical sense since an employee would not normally or reasonably require an employer to expressly agree not to withhold social security where the employee was not subject to social security in the first place. This would simply be stating the obvious. The difficulty in meeting this new test is especially true for Petitioners since the need for this new term did not arise until this decision, and hence would not have been apparent when the contracts were made.

No rational state interest or purpose exists which would justify treating Petitioners differently from other claimants suing to recover what is owed due to breach of contract.[18] Whereas other employees can recover for breach of contract simply by showing that the employer paid less than what was contractually owed, Petitioners have been saddled with the additional (and impossible) burden of affirmatively showing a contractual term prohibiting the employer from taking wrongful deductions. No common law principle or state policy is cited as to why it is proper to impose this additional

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[18] This unique and unexplainable burden creates an anomalous situation. One party may pay less than what is owed under a contract but never has to pay the full amount owed because there is no separate contractual term obligating that party not to wrongfully pay less. Here the University has admitted that it was "legally erroneous" for it to have withheld wages from Petitioners, but because the Washington Supreme Court's decision states there was no separate contractual term prohibiting such "legally erroneous" deductions, and hence no breach of contract, the University is not required to correct its error. Petitioners are still without their earned wages.

burden on Petitioners where it is not applied to others and lacks any rational justification.

Decisions by state courts have long been treated as state action for equal protection purposes. *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984); *Shelley v. Kraemer*, 334 U.S. 1 (1947). The Washington Supreme Court has denied equal treatment to Petitioners by establishing legal barriers to their breach of contract claim that are irrational and not justified by any state policy or legal principle. This denial of equal protection rights must be reviewed.

3. Washington Supreme Court's Construction of RCW 49.48.010 Creates Unequal And Irrational Distinctions Between Employees.

RCW 49.48.010 provides employees statutory protection from employers who, without right, "withhold or divert any portion of an employee's wages." (App. G) The

Washington Supreme Court recognized that this statute is impliedly a term of an employment contract, thereby making a violation of this statute another basis for claiming breach of contract.

The Washington Supreme Court's decision, however, created a distinction between terminated and non-terminated employees which does not explicitly appear on the face of the statute. Other provisions of the statute refer to an "employer or former employer" and to "employees and former employees", thereby indicating an intent to cover existing as well as terminated employment relationships. The statute has been interpreted as making "it unlawful for an employer to withhold or divert <u>any portion</u> of an employee's wages except in three limited circumstances" (emphasis added) and encompassing an "employee or former employee". *Cameron v. Neon Sky,*

Inc., 41 Wash. App. 219, 223, 703 P.2d 314, (1985).

However, the court arbitrarily limited the protection of the statute to terminated employees only. The decision denies, without reason, this statutory protection to employees whose wages were wrongfully withheld or diverted while they continue working. This ruling, coupled with the decision's insupportable conclusion that an employee cannot sue for breach of contract to recover wages withheld for social security absent an express contractual term prohibiting unauthorized deductions, effectively denies Petitioners a remedy to recover their wrongfully withheld wages.

No valid state interest is rationally served by the distinction drawn by the Washington court between terminated and non-terminated employees. On the con-

trary, the remedial purpose of RCW 49.48.010 to protect employees by ensuring that they receive their full wages[19] is actually undermined by the court's denial of any remedy to current employees. Under the Supreme Court of Washington's decision, non-terminated employees must quit their jobs in order to recover wages due -- a high and irrational price to charge for this statutory protection.

In the present case, the Supreme Court of Washington has read into Washington's wage collection statute an arbitrary and irrational distinction between terminated and non-terminated employees. The former are allowed to bring claims for recovery of wages improperly withheld by their

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[19] *See Pillatos v. Hyde*, 11 Wn.2d 403, 407, 119 P.2d 323 (1941) (statutory predecessor to RCW 49.48.010 "declares a rule of public policy in this state designed to protect wage earners in certain industries"); *Smaby v. Shrauger*, 9 Wn.2d 691, 115 P.2d 967, 970 (1941) (same). *See also Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (recognizing that state legislation regulating payment of wages functions to protect employees).

employers, whereas the latter are not. The court's reading of two separate classes of employees into RCW 49.48.010 does not rationally advance the statute's objective of ensuring that all employees receive their full wages. This judicially interpreted statutory classification scheme should be struck down as a denial of equal protection under the Fourteenth Amendment. Although this issue was raised in Petitioners' Motion for Reconsideration (App. C), the court did not deal with it.

The Washington court further denied Petitioners equal application of the laws by refusing to let its own, new legal standard be applied to Petitioners. A substantial portion of the employee class (including Mr. Pope) are terminated employees who were claiming wages due and owing at termination. At Petitioners' request, the trial court created a subclass of terminated employees who, under

the Washington Supreme Court's decision, would still have a right to recover under RCW 49.48.010. (App. H) Without opinion and without oral argument, the Washington Supreme Court quashed the trial court's order. (App. I) Thus it has applied its own judicially created law unequally by denying its application to Petitioners. There is no rational basis for this denial, which results in Petitioners being treated differently than other employees by being excluded from the statute's protection altogether. This blatant denial of Petitioners' equal protection rights must be reviewed.

B. Substantial Due Process Questions Are Raised By The Supreme Court of Washington's Entry, *Sua Sponte*, Of Summary Judgment For The University On Issues Never Briefed or Argued.

By raising new issues *sua sponte*, declaring them to be dispositive, deciding them without notice to or argument from

the affected parties, making factual findings, and granting summary judgment without giving the opposing party an opportunity to submit contrary evidence, the Washington court violated the basic underpinnings of procedural due process under the Fourteenth Amendment.[20]

Procedural due process requires, at minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

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[20] Through the acts of the University (a state instrumentality) and the state court, Petitioners have been denied their property; namely, their money in the form of earned wages. They have also been denied their contract right to those wages. Absent appropriate exercise of police power by the state, contract rights are entitled to due process protection from arbitrary state action. *E.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936). Federal and state statutes concerning social security and wage withholding provided Petitioners an entitlement to their contractual wages without having deductions taken by the state, an entitlement subject to due process protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Because Petitioners' contract right to their wages has been impaired due to application of federal and state statutes, the prohibitions of the Fifth Amendment (U.S. Const. Amend. V) and Article I section 10 of the Constitution are also violated.

306, 314-15 (1950) (notice); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard). The decision of the Supreme Court of Washington to enter summary judgment, *sua sponte*, for the University on issues not raised, briefed or argued on appeal, without advance notice to the Petitioners and without any "proper opportunity to present . . . evidence" material to that issue, violates the constitutional guarantee of due process contained in the Fourteenth Amendment. *Saunders v. Shaw*, 244 U.S. 317, 319 (1917).[21] Not only were Petitioners denied notice and an opportunity to be heard on the issues that the Washington Supreme Court deemed dispositive, but they were also denied an opportunity to show facts

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[21] *See also DuPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874, 880-81 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085 (district court's rendering of partial summary judgment for plaintiff on issue of whether property transfers were valid violated Due Process Clause, where defendants were denied opportunity to present evidence as to validity of transfers).

which would preclude entry of summary judgment for the University on the newly stated issues.

The Washington Supreme Court denied Petitioners due process in two respects. First, on the breach of contract claim, the court, as described above, rewrote basic contract law by creating a new evidentiary requirement: that Petitioner had to show that a term in the contract prohibited the University from withholding wages for social security from employees not covered by social security. This was not an issue raised by the University on appeal. Instead, the issue was raised on the court's own initiative after briefing and argument, and without notice to or opportunity to hear from Petitioners. Secondly, not only did the court raise and rule on the legal issue, but it unilaterally determined the facts concerning that issue. It concluded that because Peti-

tioners did not present evidence supporting the existence of such a term[22] (121 Wn.2d at 488, 852 P.2d at 1060; App. A 18), such a term must not exist and thus summary judgment was granted to the University. Once the issue had been identified, Petitioners were denied the opportunity to present evidence to show that summary judgment for the University was inappropriate.

The same is true as to the statutory issue. First the Washington Supreme Court, again *sua sponte* and without notice or opportunity to be heard, redefined the scope of the wage statute, RCW 49.48.010. The scope of this statute had never been

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[22] Petitioners submitted no evidence on this issue because the trial court did not find such proof to be a legal prerequisite to a breach of contract claim. Moreover, since the issue was considered by the appellate court without notice, Petitioners had no opportunity to identify evidence already in the record which would show, at least implicitly, that the parties did not intend that the University could take legally unauthorized deductions.

raised or argued by the University. Thus the court, without hearing from Petitioners, peremptorily narrowed RCW 49.48.010 by holding it provided relief only for terminated employees. Secondly, the court compounded the error by making factual conclusions concerning Petitioners' claims (again without hearing from Petitioners). It erroneously found that Petitioners' claims factually did not include wages due at termination[23] (121 Wn.2d at 489, 852 P.2d at 1061; App. A 21), and, again, granted summary judgment for the University on this claim without giving Petitioners an opportunity to submit contrary evidence.

This Court has made clear that such procedures are improper:

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[23] This factual conclusion was contrary to fact. The class did include terminated employees (including Mr. Pope) and their claim did include wages due and withheld at time of termination. *See* App. C. Such a factual showing to the trial court would have precluded entry of summary judgment for the University.

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941). Similarly, it has been held:

> When the parties have not even been notified that an issue will be considered by the court at the only point when they may submit factual affidavits -- the trial level -- then there is every likelihood that they have been denied the full opportunity to present the applicable facts. Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appel-

> late court to direct the issuance of summary judgment on a new issue raised *sua sponte* on appeal.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984), *cert. granted and judgment vacated on other grounds*, 471 U.S. 1113 (1985). *See Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2d Cir.), *cert. denied sub nom, Ithaca College Faculty Ass'n NYSUT-AFT v. N.L.R.B.*, 449 U.S. 975 (1980).

This Court has expressly held that it is error for a court to entry summary judgment against a party *sua sponte* unless "the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp v. Catrell*, 477 U.S. 317, 326 (1986). *See Fountain v. Filsons*, 336 U.S. 681, 683 (1949) (it is error to grant summary judgment *sua sponte* if party against whom judgment is entered has not

had "an opportunity to dispute the facts material to that claim.").

Here Petitioners have been denied both the right to address the correctness of the new substantive contract and statutory law defined by the Washington Supreme Court and the right to present evidence to how their claims survive this new law and that the opposing party is not entitled to summary judgment. Although this constitutional error was presented to the Washington court (App. C), it was ignored. Petitioners have been effectively denied their opportunity to be heard and to defend their substantive rights. Their denial of due process must be reviewed.

C. The Washington Supreme Court Seriously Misinterpreted and Misapplied Federal Law by Concluding Petitioners Are Subject to FICA Taxes Regardless of Whether They Were Enrolled in Social Security.

The Supreme Court of Washington's decision includes the novel theory that the

University had no implied contractual obligation to the Petitioners to pay the amount of wages promised because their employment contracts contained no term "obligating the University to refrain from withholding Social Security from the gross wage unless authorized." 121 Wn.2d at 488, 852 P.2d at 1060; App. A 18. On reconsideration the Washington court amended its opinion to state that:

> We do not suggest that an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract authorizes the deduction of Social Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. [App. E (emphasis added)].

The crux of the court's reasoning, which permeates its decision and provides the basis for its peculiar treatment of Petitioner's claims, is the conclusion that federal law regarding social security

and FICA taxes authorizes wage withholding regardless of whether a public employee is enrolled in social security. This is a gross misapplication of federal law.

While broad, social security coverage is not universal. By definition, it covers specified employment which expressly does not include services of employees "in the employ of a State, or any political subdivision thereof, or any instrumentality" of a state. 42 U.S.C. § 410(a)(7). However, this exclusion of social security coverage for state employees does not apply to services "included under an agreement [between the state and federal government] authorized under section 418." 42 U.S.C. § 410(a)(7)(A). Section 418 of the statute authorized voluntary agreements between states and the federal government, which were to "be applicable to any one or more coverage groups designated by the State". 42 U.S.C. § 418(c)(1).

Washington's Basic Agreement enrolled "retirement system coverage groups." Thus, during the relevant time period only Washington employees eligible for a retirement program were enrolled in social security.[24] Because Petitioners were not eligible for a state retirement program they were not enrolled in social security under the Basic Agreement.

Financing of social security comes from taxes imposed on covered employees and employers. 26 U.S.C. §§ 3101, 3111. The employer is to collect the tax on covered wages from the employee through wage deductions. 42 U.S.C. § 3102(a).

What the Washington Supreme Court totally disregarded was that the federal statute (FICA) imposes the tax only as to

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[24] In 1990 the statute was amended to automatically enroll state employees not covered by a retirement program, effective July 1, 1991. *See* Pub. L. No. 101-508, codified as 42 U.S.C. § 410(a)(7)(F). This has no effect on Petitioners' claims.

wages earned in "employment" as defined in the statute. 26 U.S.C. § 3101(a). Under the statute, covered employment expressly excluded "service performed in the employ of a state, or any political subdivision thereof, or any instrumentality" of the state, except where the service was "included under an agreement entered into pursuant to section 218 of the Social Security Act [42 U.S.C. § 418]." 26 U.S.C. § 3121(b)(7)(E).

Thus the federal statutory scheme unquestionably limits application of the tax under FICA only to state employees who are included in the agreement between the state and the federal government. Because the services of Petitioners were not included under Washington's Basic Agreement,

federal law did not allow their wages to be withheld for social security.[25]

In "assuming" that Petitioners' employment contracts authorized the University to withhold wages for social security, the Washington Supreme Court wrongly interpreted and applied federal law. It construed federal law as authorizing wage deductions for FICA taxes or contributions even if the employee was excluded from social security coverage. The court has thus required Petitioners to pay a federal tax when the federal law imposing that tax expressly exempted them. This serious misinterpretation and misapplication of federal law must be reviewed.

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[25] State law is consistent with the federal statutes. The state employer was authorized to withhold wages only from employees "whose services are covered by an agreement", *i.e.*, the Basic Agreement. RCW 41.48.040. The amount authorized to be withheld was the amount of the FICA tax "if such services constituted employment within the meaning" of FICA. *Id.* Since employment under FICA was limited to services included under the Basic Agreement (26 U.S.C. § 3121(b)(7)(E)), no amount was due from Petitioners.

CONCLUSION

Several thousand employees have had their wages diverted from them - wages they contracted to receive, earned, and even paid income tax on. Their wages were diverted and have not been refunded because the University chose to continue withholding wages for social security from Petitioners even though they were not liable for withholding as a matter of federal law. Yet the University has treated other employees directly the opposite by correctly applying the law, timely stopping their wage withholding, and providing them wage refunds.

Through its rulings the Washington Supreme Court has excused the University, a state institution, from its errors. In doing so Petitioners have been singled out and treated differently from other similar claiming employees. Petitioners have not

been afforded equal protection under the laws.

The Washington court's treatment of these claims directly raises the extent to which a state appellate court can deny citizens due process as guaranteed by the Fourteenth Amendment. Petitioners have been denied notice and an opportunity to be heard on the legal and factual issues determined by the Washington court.

Federal social security law has been blatantly disregarded, such that Petitioners, who were not enrolled in social security, have been subjected to a tax from which federal law has expressly exempted them.

These federal and constitutional questions must be reviewed or Petitioners will have been denied a remedy for the wrongful

taking of their wages. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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